IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
JUN 7 - 1999
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MOTION FOR LEAVE TO
PROCEED
IN FORMA PAUPERIS

Pursuant to Title 18, United States Code, § 3006A(d)(6) and Rule 39 of this Court, Petitioner, Maria Suzuki Ohler, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of fees or costs and to proceed in forma pauperis.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code, § 3006A in the district court and on appeal the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: June 7, 1999

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a defendant waives her right to appeal a ruling granting the government's *in limine* motion to introduce evidence of her prior conviction under Federal Rule of Evidence 609(a)(1) if she attempts to "remove the sting" of the conviction by introducing the conviction while testifying on direct examination?

No. _____

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Maria Suzuki Ohler, respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 9, 1999.

JURISDICTION AND CITATION OF OPINION BELOW

On March 9, 1999, the Ninth Circuit affirmed petitioner's conviction in a published opinion. See United States v. Ohler, 169 F.3d 1200 (9th Cir. 1999) (Appendix). This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

FEDERAL STATUTORY PROVISION

1. Fed. R. Evid. 609(a)(1):

> For the purpose of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused;

STATEMENT OF THE CASE

Petitioner attempted to enter the United States from Mexico at the San Ysidro, California, Port of Entry on July 29, 1997. Ohler, 169 F.3d at 1201. Customs officers searched the van she was driving and found more than eighty-one pounds of marijuana concealed in the vehicle. Id. Petitioner subsequently was charged with importation of marijuana, in violation of 21 U.S.C. § 841(a)(1), and possession of marijuana with the intent to distribute, in violation of 21 U.S.C. §§ 952 and 960.

Prior to trial, the government filed motions in limine asking the district court to admit petitioner's prior felony conviction as character evidence under Rule 404(b) and impeachment evidence under Rule 609(a)(1). Petitioner had a prior 1993 conviction for possession of methamphetamine. Id. The district court denied the motion to admit the prior conviction under Rule 404(b), but reserved ruling on the Rule 609(a)(1) basis. Id. On the morning of the first day of trial,

the court ruled that if petitioner testified on her own behalf, the prior conviction could be used to impeach her credibility pursuant to Rule 609(a)(1). Id.

Petitioner testified in her own defense. Id. During her direct examination, she admitted that she had previously been convicted of methamphetamine possession in 1993. Id. On cross-examination, the government inquired as to whether the prior conviction was a felony and petitioner responded affirmatively. Id. Subsequently, on re-direct examination, petitioner clarified that her prior conviction was for possession of methamphetamine for personal use, not possession of a distributable quantity of methamphetamine. Id. At the conclusion of a two-day trial, Ms. Ohler was convicted on b[illegible]h counts of the indictment.[1]

The Ninth Circuit did not reach the merits of petitioner's contention that the district court erred in its ruling admitting the prior conviction under Rule 609(a)(1). Id. at 1204. Instead, the Ninth Circuit held that petitioner had waived her right to challenge the district court's Rule 609(a)(1) ruling by introducing evidence of the conviction on direct examination. Id.

ARGUMENT

The Ninth Circuit's decision that petitioner waived her right to appeal the district court's Rule 609 ruling because she introduced evidence of her prior conviction during direct examination directly conflicts with the positions of two other circuits on the issue. This question appears with great regularity in both civil and criminal trials and is an issue that can substantially affect both the procedures and outcomes of said cases.

In United States v. Fisher, 106 F.3d 622 (5th Cir. 1997), the Fifth Circuit ruled in direct contrast to the Ninth Circuit's position in Ohler. In Fisher, the Fifth Circuit wrote:

---

[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

> [W]e decline to agree that when opposing counsel obtains a ruling allowing it to introduce damaging evidence on cross, the affected party who attempts to anticipate that negative evidence waives his right to object to the introduction of that testimony itself by himself raising it . . . . A holding that, under these facts, a defendant who testifies in anticipation automatically waives his right to object to a trial court's ruling admitting the damaging evidence goes against basic notions of fairness.

Fisher, 106 F.3d at 629. The Second Circuit likewise has ruled that a defendant who "removes the sting" of a prior conviction does not waive his right to appeal the trial court's Rule 609 adverse ruling. In United States v. Puco, 453 F.2d 539 (2d Cir. 1971), the Second Circuit wrote:

> The government argues that Puco's referring to his prior conviction on direct examination . . . precludes him from contending on appeal that the trial judge abused his discretion. The record shows, however, that the trial judge ruled in advance of trial that, if Puco took the stand, the government could impeach him with his prior conviction. In view of this advance ruling, Puco was entitled to attempt to offset the prejudicial effect of admission of his prior conviction by referring to it before the government did . . . .

Puco, 453 F.2d at 541 n.6. Thus, two circuits have held directly in conflict with Ohler and the other circuits in accord with the Ninth Circuit on this issue.

Two other circuits, the Tenth and Eleventh, have not squarely held in contrast to Ohler but seem to have sided with the Fifth and Second Circuits by entertaining Rule 609 challenges in cases in which the defendant introduced the prior conviction during direct examination. See United States v. Mejia-Alarcon, 995 F.2d 982 (10th Cir. 1993) (appeal challenging prior conviction admitted under Rule 609(a) that was first introduced on direct examination reviewed on its merits by court with no mention of waiver issue); United States v. Pritchard, 973 F.2d 905 (11th Cir. 1992) (same as to 609(b) conviction). To further add to the imprecision of this issue, the Third Circuit has expressly passed on deciding the Ohler issue, see United States v. Jacobs, 44 F.3d 1219 (3d Cir. 1995) (court explicitly neglected to address Ohler issue and resolved Rule 609 appeal on its merits),

and the Fourth and District of Columbia Circuits are silent as to this issue.

The circuits that have held that the introduction of a prior conviction on direct examination constitutes a waiver of the right to appeal the trial court's Rule 609 ruling generally have relied upon the proposition that a party that opens up a subject on direct examination should not then be able to challenge his opponent's pursuit of the issue. See United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir.), cert. denied, Crehore v. United States, __ U.S. __, 119 S. Ct. 256 (1998); Gill v. Thomas, 83 F.3d 537, 541 (1st Cir. 1996) (in civil rights trial, defendant waived right to appeal Rule 609 ruling by himself introducing evidence of convictions); United States v. DePriest, 6 F.3d 1201, 1209 (7th Cir. 1993) (defendant waived appeal of court's Rule 608 determination by introducing evidence of notice of violation of release conditions during direct examination); United States v. Smiley, 997 F.2d 475, 479-80 (8th Cir. 1993) (Rule 609 appellate rights waived by introducing evidence of conviction on direct examination).

This Court already has significantly bounded the rights of defendants to appeal adverse Rule 609 determinations in Luce v. United States, 469 U.S. 38 (1984) by holding that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Id. at 43. Thus, if this Court allows the constriction of appellate rights set forth in Luce to be taken one step further, as has been done in the aforementioned circuits, the already limited appellate scheme associated with Rule 609 will be further diluted. As written by Weinstein and Berger:

> This seem[s] unduly harsh . . . [that] by introducing the evidence on direct . . . the right to challenge the admissibility ruling is waived. A defendant faced with an unfavorable [Rule 609] ruling ought to have to try to live with that ruling without surrendering the right to appeal it. These . . . holdings, coupled with the Luce decision, encourage trial judges to admit prior convictions, secure in the knowledge that reversal will rarely follow.

4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 609.04[2][e], at 609-34 (Joseph M McLaughlin, ed., Matthew Bender 2d ed. 1998).

In sum, this Court should grant the instant petition to give the circuits guidance in what is clearly a confused and divided question of law among the circuits. Such guidance is particularly necessary in this case, as this issue arises with great regularity in both the civil and criminal contexts and can represent a significant strategic and procedural component at trial. Moreover, a uniform rule as to this waiver issue also is necessary to allow courts, defendants, and plaintiffs to intelligently and knowingly proceed during trials in which Rule 609 evidence may be involved.

CONCLUSION

Because Ohler is directly in contrast with the Fifth and Second Circuits and this issue requires clarification among the circuits, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: June 7, 1999

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARIA SUZUKI OHLER, *Defendant-Appellant.*	No. 98-50282 D.C. No. CR-97-02278-JTM OPINION

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted March 2, 1999[1]
Pasadena, California

Filed March 9, 1999

Before: Alfred T. Goodwin, Melvin Brunetti, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Criminal Law and Procedure/Evidence

The court of appeals affirmed a judgment of conviction. The court held that in a federal criminal prosecution, a defendant waives the right to appeal from an *in limine* ruling allow-

[1]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) (2).

ing evidence of a prior conviction under Fed. R. Evid. 609(a) by admitting it during direct examination.

After passing through a port of entry from Mexico, appellant Maria Ohler was arrested when customs inspectors found 81 pounds of marijuana in her vehicle. An indictment charged her with smuggling marijuana and possession of marijuana with intent to distribute.

At trial, the government moved *in limine* to admit Ohler's conviction for possession of methamphetamine as character evidence under Fed. R. Evid. 404(b), and as impeachment under Rule 609(a)(1). The district court ruled that the prior would be admitted if Ohler testified.

Ohler testified in her own behalf, denying knowledge of the marijuana in the van she drove across the border. She claimed that the van had been taken without her permission, and that she had gone to Mexico to retrieve it. Ohler admitted on direct examination that she had been convicted of possessing methamphetamine, and on cross-examination that the offense was a felony. However, she explained on redirect that the drug quantity involved had been for personal use, rather than for distribution. A jury convicted Ohler as charged.

On appeal, Ohler contended that the district court erred prejudicially by ruling *in limine* that the evidence of her prior conviction would be admissible if she testified.

[1] When a criminal defendant introduces evidence of his prior conviction during direct examination, the defendant waives the right to appeal the district court's *in limine* ruling that the prior was admissible under Rule 609(a)(1).

[2] Ohler faced an adverse *in limine* ruling allowing the introduction of a prior conviction for impeachment purposes, and decided to introduce evidence of her prior during her direct examination to "remove the sting" of the prior. In doing

so, Ohler waived her right to appeal the district court's *in limine* ruling that her prior conviction was admissible under Rule 609(a)(1).

COUNSEL

Gary P. Burcham and Benjamin L. Coleman, Federal Defenders of San Diego, Inc., San Diego, California, for the defendant-appellant.

Jonah H. Goldstein, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

BRUNETTI, Circuit Judge:

Maria Suzuki Ohler ("Ohler") appeals from a jury verdict finding her guilty of one count of importation of marijuana, in violation of 21 U.S.C. §§ 952 and 960, and one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Ohler contends that the district court erred when it concluded that evidence of her 1993 conviction for possession of methamphetamine was admissible under Rule 609(a)(1) of the Federal Rules of Evidence and granted the government's motion in limine. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Facts and Proceedings Below

Ohler attempted to enter the United States from Mexico through the San Ysidro, California, Port of Entry on July 29, 1997. As Ohler, the driver and sole occupant of a 1984 GMC van, passed through the port of entry, a customs inspector noticed that someone had tampered with one of the van's inte-

rior panels. Customs inspectors searched the van and discovered over eighty-one pounds of marijuana. Ohler was arrested and subsequently indicted on August 6, 1997, for importation of marijuana and possession of marijuana with intent to distribute.

Because Ohler had been previously convicted on February 13, 1993, for possession of methamphetamine, the government filed motions in limine asking the district court to admit Ohler's prior felony convictions as character evidence under Rule 404(b) and impeachment evidence under Rule 609(a)(1). The district court denied the government's motion in limine to admit Ohler's prior conviction as character evidence under Rule 404(b) and reserved ruling on whether the prior conviction was admissible for impeachment purposes under Rule 609(a)(1). On the morning of the first day of Ohler's trial, this district court concluded that, if Ohler were to testify on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility.

After the government concluded its case-in-chief, Ohler testified in her own defense and denied that she had any knowledge of the marijuana discovered in the van. Specifically, she testified that the van had been taken without her permission the night before her arrest, that she had gone to Mexico simply to retrieve the van, and that she was arrested when she attempted to return to the United States. During her direct examination, Ohler admitted that she had been previously convicted of possession of methamphetamine in 1993. On cross-examination, the government asked Ohler if her prior possession conviction was a felony and Ohler answered affirmatively. Ohler then explained on redirect examination that her prior drug possession conviction was for possession of a personal use quantity rather than for possession of a distribution quantity.

At the conclusion of Ohler's two day trial, the jury found her guilty of importation of marijuana and possession of marijuana with intent to distribute. The district court sentenced Ohler to 30 months imprisonment and three years of supervised release and assessed a $200 penalty.

II. Discussion

[1] This Court has held that, when a criminal defendant introduces evidence of his prior conviction during his direct examination, the criminal defendant waives the right to appeal the district court's in limine ruling that the prior conviction was admissible under Rule 609(a)(1). *See United States v. Williams*, 939 F.2d 721, 725 (9th Cir. 1991); *Shorter v. United States*, 412 F.2d 428, 431 (9th Cir. 1969); *see also United States v. Bryan*, 534 F.2d 205, 206 (9th Cir. 1976) (no reversible error even if evidence of prior conviction is not admissible when defendant introduces prior conviction into evidence). Ohler attempts to circumvent the express holding of *Williams* by arguing that *Williams* is no longer applicable after the 1990 amendments to Rule 609(a)(1). Ohler's argument is without merit.

Before Rule 609 was amended in 1990, it read:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609 (amended 1990).

In 1990, the statutory limitation that a witness's prior conviction could only be introduced during cross examination to

impeach the witness's testimony was removed from Rule 609. The amended and current version of Rule 609(a) reads:

> (a) General Rule. For purposes of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Fed. R. Evid. 609(a).

The Advisory Committee Note to Rule 609 explains why the limitation that a defendant's prior conviction could only be elicited during cross examination was removed from Rule 609. The Advisory Committee Note states:

> The amendment to Rule 609(a) makes two changes to the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment.

Fed. R. Evid. 609 advisory committee note. The advisory committee note demonstrates that, even prior to the 1990 amendments to Rule 609, a criminal defendant could introduce evidence of his prior convictions during his direct examination because most courts found the cross-examination limitation inapplicable. *See, e.g., United States v. Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977); *United States v. Dixon*, 547 F.2d 1079, 1082 n.2 (9th Cir. 1976).

Ohler contends that "as Rule 609(a)(1) now reads, there is no limitation as to who may introduce evidence of a prior conviction under Rule 609; if the defendant wishes to 'remove the sting' of Rule 609 evidence by bringing the conviction out on direct examination, such a strategy is statutorily sanctioned." Ohler, therefore, argues that, because the strategy of "removing the sting" is now statutorily sanctioned by Rule 609, a criminal defendant does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. Ohler's argument is meritless because even prior to the 1990 amendments to Rule 609 and this Court's decision in *Williams* a criminal defendant in this circuit could "remove the sting" of Rule 609 evidence by introducing evidence of his prior convictions during his direct examination.

This Court, in 1976, examined the text of former Rule 609 and recognized that the first sentence explicitly stated that evidence of a prior conviction could only be admitted if elicited from the witness or established by public record during cross-examination. *See Dixon*, 547 F.2d at 1082 n.2. Despite recognizing the cross-examination limitation in former Rule 609, this Court declared that "[i]t seems clear from the legislative history that on direct examination, *a party may elicit the evidence of a prior conviction from his own witness*; if the witness has forgotten or denies the existence of the conviction, the party may then introduce evidence of the conviction by public record, *even though this does not take place on cross-examination*." *Id.* (emphasis added). The Court reasoned that the purpose of the cross-examination limitation in

former Rule 609 was to insure that a prior conviction was not used to impeach a person who did not testify and that this purpose was not frustrated when a party elicited evidence of a prior conviction from his own witness during direct examination. *Id.*

Assuming, without deciding, that Ohler is correct in stating that Rule 609 now statutorily sanctions the "remove the sting" strategy that criminal defendants often employ, the 1990 amendments to Rule 609 do not reflect a true change in the law because, since at least this Court's decision in *Dixon*, a criminal defendant in this circuit has been allowed to introduce evidence of his prior criminal convictions during his direct examination. Therefore, when *Williams* was decided in 1991, a criminal defendant was explicitly allowed, despite the language of former Rule 609, to introduce evidence of his prior convictions during his direct examination. The 1990 amendments to Rule 609 do not affect the validity and/or applicability of the *Williams* decision because the "remove the sting" strategy has long been sanctioned by this Court and the 1990 amendments to Rule 609 only codify the law as it existed when *Williams* was decided.

This Court's decisions in *Dixon* and *Williams* do not stand alone. Other circuit courts have long recognized that a criminal defendant can introduce evidence of his prior convictions during his direct examination, *see, e.g., Bad Cob*, 560 F.2d at 883 ("The introduction by a witness himself, on his direct, of a prior conviction is a common trial tactic, recommended by textwriters on trial practice."), and have also held that a criminal defendant waives the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. *See, e.g., United States v. Gaitan-Acevedo*, 148 F.3d 577, 591-92 (6th Cir.), *cert. denied, Crehore v. United States*, 119 S. Ct. 256, *and rehearing denied*, 119 S. Ct. 457 (1998); *Gill v. Thomas*, 83 F.3d 537, 541 (1st Cir. 1996); *United States v. DePriest*, 6 F.3d 1201, 1209 (7th Cir. 1993); *United States v. Vega*, 776 F.2d 791, 792 (8th Cir. 1985). Furthermore, no circuit court has found it necessary to reexamine the waiver issue in light of the 1990 amendments of Rule 609. *See, e.g., United States v. Fisher*, 106 F.3d 622, 629 (5th Cir. 1997) (defendant does not waive right to appeal); *United States v. Smiley*, 997 F.2d 475, 479-80 (8th Cir. 1993) (defendant waives right to appeal); *United States v. Brown*, 956 F.2d 782, 787 (8th Cir. 1992) (same). These decisions reinforce the position of the advisory committee that the 1990 amendments to Rule 609 only removed a limitation that most courts already found inapplicable and support the conclusion that this Court's decision in *Williams* has not been disturbed by the 1990 amendments to Rule 609.

Ohler's reliance on the Fifth Circuit's decision in *Fisher* to support the argument that the 1990 amendments to Rule 609 represent a fundamental change in the law that affects this Court's decision in *Williams* is misplaced. The *Fisher* decision does not address the 1990 amendments to Rule 609. *See Fisher*, 106 F.3d at 629. It simply follows Fifth Circuit precedent that holds that a party does not waive the right to appeal an in limine ruling that a prior conviction is admissible when the defendant introduces evidence of his prior conviction during his direct examination. *Id.* (citing *Reyes v. Missouri Pac. R.R.*, 589 F.2d 791 (5th Cir. 1979)). Thus, the *Fisher* decision does not rely on the 1990 amendments to Rule 609 but relies on precedent that pre-dates 1990 to conclude that a defendant does not waive the right to appeal a district court's in limine ruling when the defendant introduces evidence of his prior convictions during his direct examination. *See id.* Just as the law of the Fifth Circuit has not been affected by the 1990 amendments to Rule 609, the law of this circuit and the *Williams* decision have not been altered by the 1990 amendments to Rule 609.

[2] Ohler argues that even if *Williams* is still good law, this case is distinguishable from *Williams* because the government in this case affirmatively moved to introduce the prior convic-

tion. This argument is wholly without merit and disingenuous. This case and *Williams* are indistinguishable. In *Williams*, "[t]he district court ruled *in limine* that the prosecution could admit into evidence for impeachment purposes under Rule 609(a)(1) Williams's prior state conviction for possession of marijuana for sale." *Williams*, 939 F.2d at 723. Here, Ohler faced the exact same situation as the defendant in *Williams*—an adverse in limine ruling allowing the introduction of a prior conviction for impeachment purposes—and she, like the defendant in *Williams*, decided to introduce evidence of her prior conviction during her direct examination to "remove the sting" of the prior conviction. In so doing, Ohler waived her right to appeal the district court's in limine ruling that her prior conviction was admissible under Rule 609(a)(1). *Williams*, 939 F.2d at 725.

Because Ohler waived her right to appeal the district court's in limine ruling, we need not decide whether the district court erred when it determined that Ohler's prior conviction for possession of methamphetamine was admissible for impeachment purposes under Rule 609(a)(1) of the Federal Rules Evidence.

AFFIRMED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

STATE OF CALIFORNIA,)
) ss:
COUNTY OF SAN DIEGO,)

Sylvia Enrique, being first duly sworn, deposes and says: That pursuant to Rule 29.4(a) of this Court served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT on the counsel for Respondent by enclosing a copy thereof in an envelope, First Class Postage Prepaid, addressed to:

The Honorable Drew S. Days, III , Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California on June 7, 1999.

SYLVIA ENRIQUE, Affiant

Subscribed and Sworn to before me
this 7th day of June 1999.

Notary Public in and for said
County and State.

(Seal)

Monica Maria Hernandez
COMM. # 1198083
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. OCT. 10, 2002

IN THE

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STATE OF CALIFORNIA,)
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The Honorable Drew S. Days, III , Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States mails at San Diego, California on June 7, 1999.

SYLVIA ENRIQUE, Affiant

Subscribed and Sworn to before me
this 7th day of June 1999.

Monica Maria Hernandez
Notary Public in and for said
County and State.

(Seal)

Monica Maria Hernandez
COMM. # 1186083
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
COMM. EXP. OCT. 10, 2002